STATE OF WISCONSIN

DWD

Department of Workforce Development

UNEMPLOYMENT INSURANCE ADVISORY COUNCIL

Council Members: Please bring your calendars to schedule future meetings.
Council Website: http://dwd.wisconsin.gov/uibola/uiac/

MEETING

Date: May 11, 2017

Time: **9:30** a.m. – 4:00 p.m.

Place: Department of Workforce Development
201 E. Washington Avenue
Madison, Wisconsin
GEF-1, Room F305

AGENDA ITEMS AND TENTATIVE SCHEDULE:

1. Call to Order and Introductions
2. Approval of Minutes of the April 20, 2017 Council Meeting
3. Department Update
4. Report on the Unemployment Insurance Reserve Fund – Tom McHugh
5. Update on Court Cases
   - *Lela M. Operton v LIRC & Walgreen Co Illinois*
   - *DWD v. LIRC, Valarie Beres & Mequon Jewish Campus, Inc.*
6. Update on Legislation
   - Budget Bill (SB30 / AB64)
   - Mobility Grant Study (AB 243)
   - Work Search Waiver (SB83 / AB131)

7. Department Proposals For Agreed Bill Pending Action
    - D17-01 – Assessment for Employers that Fail to Comply with Adjudication Request
    - D17-03 – Assessment for Failure to Produce Records
    - D17-06 – Standard of Proof in Unemployment Insurance Law Cases
    - D17-07 – Revision of Collections Statutes
    - D17-08 – Various Minor and Technical Changes
8. Management & Labor Proposals for Agreed Bill
9. Timeline of Agreed Bill
10. Agenda Items for May 23, 2017 Meeting
11. Adjourn

Notice:

- The Council may not address all agenda items or follow the agenda order.
- The Council may take up action items at a time other than that listed.
- The Council may discuss other items, including those on any attached lists.
- Some or all of the Council members may attend the meeting by telephone.
- The employee members and/or the employer members of the Council may convene in closed session at any time during the meeting to deliberate any matter for potential action and/or items posted in this agenda, pursuant to sec. 19.85(1)(ee), Stats. The employee members and/or the employer members of the Council may thereafter reconvene again in open session after completion of the closed session.
- This location is handicap accessible.
- If you have other special needs (such as an interpreter or written materials in large print), please contact Robin Gallagher, Phone: (608) 267-1405, Unemployment Insurance Division, Bureau of Legal Affairs, P.O. Box 8942, Madison, WI 53708. Hearing and speech impaired callers may reach us at the above phone number through WI TRS (or TDD/Voice Relay 1-800-947-3529.).

UNEMPLOYMENT INSURANCE ADVISORY COUNCIL

Meeting Minutes

Offices of State of Wisconsin Department of Workforce Development
201 E. Washington Avenue, GEF I, Room F305
Madison, WI

April 20, 2017

The department provided public notice of the meeting under Wis. Stat. §19.84.

Members Present: Janell Knutson (Chair), Scott Manley, Mike Gotzler, Ed Lump, John Mielke, Earl Gustafson, Sally Feistel, Shane Griesbach, Terry Hayden and Mark Reihl

Department Staff Present: Georgia Maxwell (DWD Deputy Secretary), Joe Handrick, Andy Rubsam, Karl Dahlen, Andrew Evenson, Becky Kikkert, Ethan Schuh, Tom McHugh, Mary Jan Rosenak, Pam James, Janet Sausen, Robert Usarek, Jill Moksouphanh, Amy Banicki, Jason Schunk, Emily Savard, Mike Myszewski, Karen Schultz, and Robin Gallagher

Members of the Public Present: Chris Reader (Wisconsin Manufacturer & Commerce), Maria Gonzalez Knavel (Labor and Industry Review Board (LIRC), General Council) Mary Beth George (Rep. Sinicki's Office) Mike Duchek (Leg. Reference Bureau), Victor Forberger (Wisconsin UI Clinic), Brian Dake (Wis. Independent Businesses, Inc.), and Bill Smith (National Federation of Independent Business)

1. Call to Order and Introduction

Ms. Knutson called the Unemployment Insurance Advisory Council (Council) meeting to order at 9:35 a.m. under Wisconsin's Open Meetings law. Council members introduced themselves and Ms. Knutson recognized Maria Gonzalez of LIRC.

2. Approval of Minutes of the March 16, 2017 Council Meeting

Motion by Mr. Griesbach, second by Mr. Gotzler to approve the March 16, 2017 meeting minutes. The motion carried unanimously and the minutes were approved without correction.

3. Department Update

Ms. Knutson stated that the statewide tornado drill will be conducted today at 1:45 p.m. Ms. Gallagher will escort Council members to the basement.

The month of May marks the 85th anniversary of the Council. A special recognition of this anniversary will be part of the May meeting.

Mr. Handrick welcomed back Jason Schunk as the Deputy Director of the Bureau of Benefits. Mr. Schunk previously worked at the department.

4. Open Records Training

As required, a video on Wisconsin's Public Records Law was played for the Council. The video explained how to comply with Wisconsin's public records law and public record responsibilities.

5. Financial Outlook Report

Mr. Usarek presented the Financial Outlook Report of the Unemployment Insurance (UI) Trust Fund as required under Wis. Stat. § 16.48. The 2017 Financial Outlook of the Wisconsin UI program was submitted to the Governor's Office on April 14, 2017.

The report provides an explanation of the UI financing system, and the projection of the UI Trust Fund through 2019. Over the past two years, the UI Trust Fund has increased substantially due to the strength of the economy and UI benefit payments being historically low. The balance of the UI Trust Fund was $214 million at the end of 2014 and $1.16 billion at the end of 2016.

Benefit payments over the past two years have been historically low, making projections of the Trust Fund balance difficult to construct. Projections are typically based on recessionary and statistical risks. Because of the historically low UI benefit payments, the report outlines three different benefit scenarios (all presume continued economic growth).

Scenario one assumes that benefit payments for the next three years will be similar to benefit payments over the past three years, maintaining the current historically low level of benefit payments over the projection period. Under this scenario, the Trust Fund is expected to grow throughout the period but at a much slower rate than seen in the past few years.

Scenario two assumes that benefit payment levels slowly return to levels typically seen with 4 percent to 4.5 percent unemployment. If this were to occur, the Trust Fund balance is expected to decline between 2018 and 2019 due to tax revenue being lower than the amount of benefits paid.

Scenario three assumes that in 2018, benefit payments will quickly return to levels typically seen with 4 percent to 4.5 percent unemployment. Benefit payments are projected to increase $282 million between 2017 and 2018; however, the projection of UI tax revenue remains basically flat. This would cause the Trust Fund balance to be below current levels.

The Secretary recommends the Council review and advance legislative measures to strengthen the UI Trust Fund and support policies that support Trust Fund solvency. Future Council proposals could address mechanisms to build and maintain sufficient reserve funding to meet the obligations of projected future benefit expenditures. Such mechanisms could encompass both benefits and revenue. The department is prepared to support the Council as it considers options to further strengthen the UI program.

Mr. Gustafson requested information on a national comparison on the Average High Cost Multiple used by other states. The department will provide the information.

6. Worker Misclassification Quarterly Report

Mr. Myszewski reported on worker misclassification. Since the fiscal year start on October 1, 2016 through April 17, 2017, 243 worker classification investigations have been completed. Mr. Myszewski provided the following information:

- 92 cases have been referred to Field Audit during the current fiscal year compared to 68 cases the same point last fiscal year (an increase of 24 referrals).
- Since May 2013, a total of 2,947 misclassified workers has been identified.
- Since May 2013, a total of $1,251,133 in UI tax and interest have been assessed.
- Approximately 70 percent of all investigations conducted result in no violations being identified.
- Educational videos have been completed and published on the department's website on appeal hearing procedures and how to properly classify a worker as an employee or an independent contractor.
- The worker classification unit is fully staffed with a Spanish speaking investigator assisting as needed from the Labor Standards Bureau.
- The department is currently working on two public service announcements regarding worker misclassification that will air in summer and fall of 2017.
- The federal grant for worker misclassification ends in September; however, funds from the Program Integrity Fund will be used to continue misclassification investigations.
- The new intentional misclassification law went into effect on October 2, 2016. Since that time, there have been three referrals to the Field Audit Section for second offense misclassification.
- With construction season in full swing, the majority of investigative resources are applied to construction work sites; however, there are sufficient resources to continue investigations of other industries when tips are received.

Mr. Handrick thanked the Council for their work on the Agreed Bill last session which provides funding for the worker misclassification unit through the Program Integrity Fund.

7. Update on Court Cases

Ms. Knutson stated that the Supreme Court has not yet issued a decision in the *Lela M. Operton v. LIRC & Walgreen Co Illinois* case. The department filed a Petition for Review with the Wisconsin Supreme Court in the *DWD v. LIRC, Valarie Beres & Mequon Jewish Campus, Inc.* case.

8. Update on Occupational Drug Testing

U.S. House Resolution 42, which disapproves the U.S. Department of Labor (USDOL) regulation for occupational drug testing, was signed by the President on March 31, 2017.

9. Various Administrative Rule Changes – Scope Statement

The Council is requested to approve the scope statement revising administrative code chapters DWD 100 to 150 relating to the UI program and making minor and technical changes to these rules. The scope statement also includes amending the wait time at appeal tribunal hearings to ten minutes for all parties, as requested by the Council during the last Agreed Bill cycle. The department expects to have a draft of the rule to present to the Council later in the year.

10. Update on Legislation

Budget Bill (SB 30/AB 64)

Mr. Rubsam stated there are no updates to provide on the Budget Bill at this time.

Mobility Grant Study (AB 243)

The Mobility Grant Study that was introduced in the Budget Bill has been removed from the Budget Bill and has been introduced as Assembly Bill 243 (AB 243). AB 243 is similar to the Budget Bill version and will require the department to conduct a study to determine if grant money could be paid to encourage individuals to seek work in other locations throughout Wisconsin to possibly reduce unemployment. If the mobility study finds it would be beneficial to pay individuals to seek work in other locations, money to pay those grants could not be taken from the Trust Fund or the Unemployment Insurance Division's federal administrative grant.

Work Search Waiver (SB 83/AB 131)

Mr. Rubsam informed the Council that USDOL contacted the department with an informal opinion that, if SB 83/AB 131 were adopted, Wisconsin law would not conform to federal requirements. The reason for this opinion is that federal statute requires claimants to actively seek work and a claimant cannot be waived from work search for their entire claim period. USDOL stated that the current administrative rule does conform to federal requirements. The current rule allows an eight week exemption from work search, which can be extended an additional four weeks, if the claimant is expected to be recalled to a job. Mr. Rubsam asked USDOL if a claimant could receive a work search waiver for 16 or 20 weeks; however, no federal guidance was provided.

Mr. Lump stated he has been receiving a lot of complaints, mostly in the Fox Valley area, that people applying for jobs do not show up for interviews, refuse the job or quit after a day or two of working. Mr. Gotzler stated he has also received telephone calls similar to this. Ms. Knutson encouraged employers to report these incidents to the department for follow-up as it could be determined as a failure to accept suitable work or as a quit and a claimant could lose benefits. Ms. Knutson will provide contact information for employers to report individuals.

The department has contacted the authors of this bill informing them of USDOL's informal opinion. The fiscal estimate indicates a cost of $3.17 million annually to the Trust Fund.

11. Department Proposals for Agreed Upon Bill Pending Action

D17-07 Revision of Collections Statutes

Mr. Rubsam stated the department is still conducting research to revise statutory language in response to an adverse court decision that was received and will present the changes at an upcoming meeting.

D17-10 Amendments to Drug Testing Statutes

Mr. Rubsam reported on a minor change to D17-10 that added an amendment that provides the General Purpose Revenue funds for drug-testing and treatment that are not used be transferred to the Program Integrity Fund at the end of the biennium.

Ms. Knutson requested the Council discuss department proposals during caucus. If any proposals are agreed upon, the department can send the proposal to the Legislative Reference Bureau for drafting.

12. Management and Labor Proposals for Agreed Bill

Ms. Knutson stated management and labor proposals are part of the agenda if the Council wishes to discuss proposals during caucus.

13. Agreed Bill Timeline

Ms. Knutson reviewed the timeline for the Agreed Bill schedule. Council meetings have been scheduled for May and June, and tentative dates scheduled from July to December. The department is urging the Council to complete work on the Agreed Bill for legislative introduction during fall session. If additional dates are needed in the summer or meetings need to be rescheduled, the department can poll the Council and make changes as necessary to keep the process moving forward. Mr. Manley suggested the Council determine a deadline date for exchanging proposals to avoid any conflicts that may stall progress on the movement of the Agreed Bill. Ms. Knutson stated that the department can also schedule additional meetings as necessary.

14. Motion to Caucus

Motion by Mr. Gotzler, second by Mr. Hayden to recess and go into closed session pursuant to Wis. Stat. §19.85(1)(ee), to deliberate agenda items at 10:30 a.m. All Council members voted "Aye" and the motion carried unanimously.

15. Report out of Caucus

The Council reconvened at 1:30 p.m. Mr. Manley reported the Council has agreement on the following:

- D17-02 – Fiscal Agent Joint and Several Liability
- D17-04 – Ineligibility for Concealment of Holiday, Vacation, Termination, or Sick Pay
- D17-05 – Ineligibility for Failure to Provide Information
- D17-10 – Amendments to Drug Testing Statutes
- Scope Statement associated with D17-09.

Motion by Mr. Manley, second by Mr. Reihl to approve department proposals D17-02, D17-04, D17-05, D17-10 and the Scope Statement associated with D17-09. The motion carried unanimously.

The Labor and Management members tentatively plan to exchange proposals at the May meeting.

16. Agenda Items for May 18, 2017

The department will conduct a poll of the Council members to determine an alternate date for the May meeting and also determine availability for the June and July meeting dates.

17. Adjourn

Motion by Mr. Lump, second by Mr. Manley to adjourn at 1:35 p.m. The motion carried unanimously.

UI Reserve Fund Highlights

May 11, 2017

1) The Trust Fund ending cash balance on May 8, 2017, was $1,371,349,258.

2) Year-to-date regular UI payments through May 6th decreased by $20,592,944, or 8.7%, to a total of $217,259,398 when compared to the same period one year ago.

3) Benefits paid in the past 52 weeks compared to the same period a year ago declined $63.1 million or 11.7%.

52 weeks ending 5/6/17	$476,381,574
52 weeks ending 5/7/16	$539,480,592

4) Calendar year tax receipts decreased 18.1%:

1/1/2017 – 5/6/2017	$407,093,487
1/1/2016 – 5/7/2016	$496,954,837
Decrease	$89,861,350

5) First quarter interest earned was $6,329,240. The 2017 forecasted interest is $31.5 million. The 2016 interest earned was $21.8 million.

Historical Rates

Years	Schedule
1990	Schedule B
1991-1997	Schedule C
1998-2003	Schedule D
2004	Schedule C
2005-2009	Schedule B
2010 – 2015	Schedule A
2016	Schedule B
2017	Schedule C

Rate Table Schedule A Through Schedule D

Wisconsin Statute 108.18 Tax Table

		SCHEDULE A 2015		SCHEDULE B 2016		SCHEDULE C 2017		SCHEDULE D 2018	
RESERVE PERCENT		**Tax Rate %**		**Tax Rate %**		**Tax Rate %**		**Tax Rate %**	
		Payroll		Payroll		Payroll		Payroll	
At least	But less than	Under $500K	$500K or over	Under $500K	$500K or over	Under $500K	$500K or over	Under $500K	$500K or over
Greater than 15%		0.27	0.70	0.05	0.10	0.00	0.05	0.00	0.05
10.00%	15.00%	0.27	0.70	0.25	0.30	0.22	0.25	0.12	0.15
9.50%	10.00%	0.45	1.05	0.40	0.50	0.37	0.40	0.27	0.30
9.00%	9.50%	0.53	1.23	0.50	0.65	0.47	0.50	0.37	0.40
8.50%	9.00%	0.92	1.42	0.85	0.95	0.75	0.80	0.65	0.70
8.00%	8.50%	1.09	1.59	1.00	1.15	0.90	1.00	0.80	0.90
7.50%	8.00%	1.26	1.76	1.10	1.30	1.00	1.15	0.90	1.05
7.00%	7.50%	1.47	1.97	1.30	1.50	1.20	1.35	1.10	1.25
6.50%	7.00%	1.83	2.23	1.60	1.80	1.45	1.65	1.35	1.55
6.00%	6.50%	2.18	2.58	1.95	2.15	1.80	2.00	1.70	1.90
5.50%	6.00%	2.62	3.02	2.40	2.55	2.20	2.40	2.10	2.30
5.00%	5.50%	3.06	3.46	2.80	2.95	2.60	2.80	2.50	2.70
4.50%	5.00%	3.40	3.90	3.20	3.35	3.00	3.20	2.90	3.10
4.00%	4.50%	3.84	4.34	3.60	3.70	3.40	3.55	3.30	3.45
3.50%	4.00%	4.28	4.78	4.10	4.15	3.85	4.00	3.75	3.90
0.00%	3.50%	4.77	5.27	4.65	4.70	4.40	4.55	4.30	4.45
LT 0	-1.00%	6.60	6.60	6.60	6.60	6.40	6.40	6.40	6.40
-1.00%	-2.00%	7.10	7.10	7.10	7.10	6.90	6.90	6.90	6.90
-2.00%	-3.00%	7.60	7.60	7.60	7.60	7.40	7.40	7.40	7.40
-3.00%	-4.00%	8.10	8.10	8.10	8.10	7.90	7.90	7.90	7.90
-4.00%	-5.00%	8.60	8.60	8.60	8.60	8.50	8.50	8.50	8.50
-5.00%	-6.00%	9.10	9.10	9.10	9.10	9.05	9.05	9.05	9.05
-6.00%	-7.00%	9.80	9.80	9.80	9.80	9.80	9.80	9.75	9.75
-7.00%	-8.00%	10.55	10.55	10.55	10.55	10.55	10.55	10.55	10.55
-8.00%	-9.00%	11.30	11.30	11.30	11.30	11.30	11.30	11.30	11.30
-9.00%		12.00	12.00	12.00	12.00	12.00	12.00	12.00	12.00
Rates unaffected by schedule									
New Employer		3.60	4.10	3.25	3.40	3.05	3.25	3.05	3.25
New Construction Rates Calculated Annually									

Rate Schedule Changes
Effects of Schedule C to D

SCHEDULE C			SCHEDULE D			Schedule D Less Schedule C			
Tax Rate %			Tax Rate %			Tax Rate % Change			Tax Rate $ Change
Employers Under $500K	Employers $500K or over		Employers Under $500K	Employers $500K or over		Employers Under $500K	Employers $500K or over		Per Taxable Wage $14,000
0	0.05		0	0.05		0	0		$ -
0.22	0.25		0.12	0.15		(0.10)	(0.10)		$ (14)
0.37	0.40		0.27	0.30		(0.10)	(0.10)		$ (14)
0.47	0.50		0.37	0.40		(0.10)	(0.10)		$ (14)
0.75	0.80		0.65	0.70		(0.10)	(0.10)		$ (14)
0.90	1.00		0.80	0.90		(0.10)	(0.10)		$ (14)
1.00	1.15		0.90	1.05		(0.10)	(0.10)		$ (14)
1.20	1.35		1.10	1.25		(0.10)	(0.10)		$ (14)
1.45	1.65		1.35	1.55		(0.10)	(0.10)		$ (14)
1.80	2.00		1.70	1.90		(0.10)	(0.10)		$ (14)
2.20	2.40		2.10	2.30		(0.10)	(0.10)		$ (14)
2.60	2.80		2.50	2.70		(0.10)	(0.10)		$ (14)
3.00	3.20		2.90	3.10		(0.10)	(0.10)		$ (14)
3.40	3.55		3.30	3.45		(0.10)	(0.10)		$ (14)
3.85	4.00		3.75	3.90		(0.10)	(0.10)		$ (14)
4.40	4.55		4.30	4.45		(0.10)	(0.10)		$ (14)
	OVERDRAWN								
6.40	6.40		6.40	6.40		-	-		-
6.90	6.90		6.90	6.90		-	-		-
7.40	7.40		7.40	7.40		-	-		-
7.90	7.90		7.90	7.90		-	-		-
8.50	8.50		8.50	8.50		-	-		-
9.05	9.05		9.05	9.05		-	-		-
9.80	9.80		9.75	9.75		(0.05)	(0.05)		$ (7)
10.55	10.55		10.55	10.55		-	-		-
11.30	11.30		11.30	11.30		-	-		-
12.00	12.00		12.00	12.00		-	-		-

Small Employers

(Less than $500K Taxable Payroll)

Hypothetical Comparison Schedule C to Schedule D**

1	2	3	4	5	6
Tax Rate 2017 Schedule C	Number of Employers As of 4/25/2017	FY16 Payroll* ($ Millions)	FY16 Payroll* Taxes Assessed Schedule C ($ Millions)	FY16 Payroll* Taxes Assessed Schedule D ($ Millions)	Tax Reduction (col 5-4) ($ Millions)
0.00 %	10,530	$ 229.3	$ -	$ -	$ -
0.22 %	18,114	$ 982.9	$ 2.2	$ 1.2	$ (1.0)
0.37 %	6,074	$ 406.9	$ 1.5	$ 1.1	$ (0.4)
0.47 %	6,511	$ 571.1	$ 2.7	$ 2.1	$ (0.6)
0.75 %	5,896	$ 579.5	$ 4.3	$ 3.8	$ (0.6)
0.90 %	6,109	$ 645.6	$ 5.8	$ 5.2	$ (0.6)
1.00 %	6,386	$ 682.3	$ 6.8	$ 6.1	$ (0.7)
1.20 %	5,223	$ 605.1	$ 7.3	$ 6.7	$ (0.6)
1.45 %	6,862	$ 589.9	$ 8.6	$ 8.0	$ (0.6)
1.80 %	4,022	$ 440.9	$ 7.9	$ 7.5	$ (0.4)
2.20 %	3,761	$ 383.4	$ 8.4	$ 8.1	$ (0.4)
2.60 %	3,529	$ 320.9	$ 8.3	$ 8.0	$ (0.3)
3.00 %	2,394	$ 222.7	$ 6.7	$ 6.5	$ (0.2)
3.05 %	24,655	$ 468.2	$ 14.3	$ 14.3	$ -
3.40 %	2,002	$ 193.3	$ 6.6	$ 6.4	$ (0.2)
3.85 %	1,703	$ 169.8	$ 6.5	$ 6.4	$ (0.2)
4.40 %	5,828	$ 455.0	$ 20.0	$ 19.6	$ (0.4)
6.40 %	1,609	$ 116.9	$ 7.5	$ 7.5	$ -
6.90 %	924	$ 79.2	$ 5.5	$ 5.5	$ -
7.40 %	400	$ 39.7	$ 2.9	$ 2.9	$ -
7.90 %	385	$ 39.0	$ 3.1	$ 3.1	$ -
8.50 %	996	$ 61.2	$ 5.2	$ 5.2	$ -
9.05 %	537	$ 43.7	$ 4.0	$ 4.0	$ -
9.80 %	272	$ 24.3	$ 2.4	$ 2.4	$ -
10.55 %	268	$ 26.1	$ 2.8	$ 2.8	$ -
11.30 %	738	$ 51.8	$ 5.8	$ 5.8	$ -
12.00 %	3,025	$ 216.8	$ 26.0	$ 26.0	$ -
Seasonal Solvency	18	$ 1.4	$ 0.1	$ 0.1	$ -
Total Small	**128,771**	**$ 8,646.8**	**$ 183.1**	**$ 175.9**	**$ (7.2)**

* FY16 Payroll is 3rd and 4th Quarter 2015 and 1st and 2nd Quarter 2016.

**Schedule D projection is restated 2017 tax rates holding everything else constant.

New Employer Rates (New Employer Rates do not change from C to D).

Large Employers

($500K or More Taxable Payroll)

Hypothetical Comparison Schedule C to Schedule D**

1	2	3	4	5	6
Total Tax Rate Schedule C	**Number of Employers**	**FY16 Payroll* ($ Millions)**	**FY16 Payroll* Taxes Assessed Schedule C ($ Millions)**	**FY16 Payroll* Taxes Assessed Schedule D ($ Millions)**	**Tax Reduction (col 5-4) ($ Millions)**
0.05 %	31	$ 25.6	$ -	$ -	$ -
0.25 %	277	$ 382.4	$ 1.0	$ 0.6	$ (0.4)
0.40 %	207	$ 327.8	$ 1.3	$ 1.0	$ (0.3)
0.50 %	497	$ 888.5	$ 4.4	$ 3.6	$ (0.9)
0.80 %	595	$ 1,047.0	$ 8.4	$ 7.3	$ (1.0)
1.00 %	939	$ 2,312.8	$ 23.1	$ 20.8	$ (2.3)
1.15 %	1,212	$ 3,405.5	$ 39.2	$ 35.8	$ (3.4)
1.35 %	1,266	$ 3,761.9	$ 50.8	$ 47.0	$ (3.8)
1.65 %	1,056	$ 3,436.0	$ 56.7	$ 53.3	$ (3.4)
2.00 %	788	$ 1,746.1	$ 34.9	$ 33.2	$ (1.7)
2.40 %	538	$ 1,020.4	$ 24.5	$ 23.5	$ (1.0)
2.80 %	444	$ 976.9	$ 27.4	$ 26.4	$ (1.0)
3.20 %	267	$ 464.0	$ 14.8	$ 14.4	$ (0.5)
3.25 %	183	$ 285.4	$ 9.3	$ 9.3	$ -
3.55 %	193	$ 398.2	$ 14.1	$ 13.7	$ (0.4)
4.00 %	146	$ 319.7	$ 12.8	$ 12.5	$ (0.3)
4.55 %	475	$ 1,042.2	$ 47.4	$ 46.4	$ (1.0)
6.40 %	69	$ 136.1	$ 8.7	$ 8.7	$ -
6.90 %	64	$ 111.2	$ 7.7	$ 7.7	$ -
7.40 %	30	$ 109.8	$ 8.1	$ 8.1	$ -
7.90 %	39	$ 110.2	$ 8.7	$ 8.7	$ -
8.50 %	28	$ 33.4	$ 2.8	$ 2.8	$ -
9.05 %	41	$ 79.1	$ 7.2	$ 7.2	$ -
9.80 %	25	$ 24.6	$ 2.4	$ 2.4	$ -
10.55 %	23	$ 34.3	$ 3.6	$ 3.6	$ -
11.30 %	32	$ 46.3	$ 5.2	$ 5.2	$ -
12.00 %	157	$ 275.2	$ 33.0	$ 33.0	$ -
Seasonal Solvency	1	$ 0.7	$ 0.0	$ 0.0	$ -
Total Large	**9,623**	**$ 22,801.5**	**$ 457.7**	**$ 436.1**	**$ (21.5)**

* FY16 Payroll is 3rd and 4th Quarter 2015 and 1st and 2nd Quarter 2016.

**Schedule D projection is restated 2017 tax rates holding everything else constant.

New Employer Rates (New Employer Rates do not change from C to D).

To: Unemployment Insurance Advisory Council

From: Andy Rubsam

CC: Janell Knutson, Chair

Date: May 11, 2017

Re: *Operton v. Labor & Indus. Review Comm'n*, 2017 WI 46. (Decision issued May 4, 2017.)

The employee worked as a cashier. The employer's policy is that cash-handling incidents resulting in shortages would result in discipline. The employee was aware of the policy. The employee made several small cash-handling errors. The employee was required to check customer ID for any credit card transaction for $50. The last incident involved a $399.27 charge on a stolen credit card due to the employee failing to check the customer's ID. The employee was fired for the cash handling errors.

The Department determined that the employee was discharged for misconduct. The appeal tribunal determined that the employee was discharged for substantial fault, not misconduct. LIRC affirmed the appeal tribunal decision that the employee was discharged for substantial fault. The Circuit Court affirmed LIRC's decision that the employee was discharged for substantial fault.

The Court of Appeals, using the *de novo* review standard, reversed LIRC's decision. The Court of Appeals noted that there "is no dispute that Operton had the ability and skill to do her job as Operton correctly performed 80,000 cash transactions, meaning she correctly performed 99.9% of her cash handling transactions."

The Supreme Court affirmed the Court of Appeals and reversed LIRC's decision. Chief Justice Roggensack's decision states: "the level of deference we afford LIRC is inconsequential as LIRC did not provide an articulated interpretation of Wis. Stat. § 108.04 in denying Operton unemployment benefits." Majority Decision, ¶ 23. The Supreme Court held that "**the [substantial fault] statute does not state whether there is a limitation on the number of**

inadvertent errors an employee may commit before the employee's errors are no longer inadvertent. However, we need not determine if a numerical limit exists. Under the facts of this case, it suffices to interpret the statute to mean that multiple inadvertent errors, even if the employee has been warned about the errors, does not necessarily constitute substantial fault." Majority Decision, ¶ 46 (emphasis added).

The facts of this case, such as "the length of Operton's employment, the number of transactions Operton handled throughout her employment, and the variety of the errors she committed compels the conclusion that she was not terminated from Walgreens for substantial fault. While all of the errors fell within the same general cash-handling duties of her employment, the errors were, nevertheless, inadvertent." Majority Decision, ¶ 53.

Justice Abrahamson's concurrence stated that LIRC was due no deference in this case. Justice Abrahmson also criticizes the majority's decision: "According to this text [of the statute], **the 'inadvertent errors' analysis contains no numerical limits**." Abrahamson Concurrence, ¶ 66 (emphasis added). Justice Ann Walsh Bradley joined this concurrence.

Justice Ziegler concurred and stated: "While the subject of agency deference may currently be a 'hot button' issue, the law in Wisconsin on the subject is well-established….I would want to see the issue set forth, briefed, and argued before expressing an opinion on the merits of such a change [to the deference standard]." Ziegler Concurrence, ¶ 71.

Justice Rebecca Bradley's concurrence described the history of agency deference in Wisconsin law. "But when the legislature delegates broad authority to an executive agency, which in turn interprets and enforces that delegated authority, the judiciary risks the liberty of all citizens if it abdicates its constitutional responsibility to check executive interpretations of the law." Bradley Concurrence, ¶ 80. Justices Gableman and Kelley joined this concurrence.

SUPREME COURT OF WISCONSIN

CASE NO.:	2015AP1055
COMPLETE TITLE:	Lela M. Operton, Plaintiff-Appellant, v. Labor and Industry Review Commission, Defendant-Respondent-Petitioner, Walgreen Co. Illinois, Defendant.
	REVIEW OF A DECISION OF THE COURT OF APPEALS 369 Wis. 2d 166, 880 N.W.2d 169 (2016 WI App 37 - Published)
OPINION FILED:	May 4, 2017
SUBMITTED ON BRIEFS:	
ORAL ARGUMENT:	November 10, 2016
SOURCE OF APPEAL:	
COURT:	Circuit
COUNTY:	Dane
JUDGE:	John C. Albert
JUSTICES:	
CONCURRED:	ABRAHAMSON, J. concurs, joined by BRADLEY, A. W., J. (opinion filed). ZIEGLER, J. concurs (opinion filed). BRADLEY, R. G., J. concurs, joined by GABLEMAN, J. and KELLY, J. (opinion filed).
DISSENTED:	
NOT PARTICIPATING:	
ATTORNEYS:	

For the defendant-respondent-petitioner, there was a brief by *William Sherlin Sample* and *Labor & Industry Review Commission,* Madison, and oral argument by *William Sherlin Sample*

For the plaintiff-appellant, there was a brief by *Marilyn Townsend*, and *Law Offices of Marilyn Townsend,* Madison, and oral argument by *Marilyn Townsend.*

For *Amicus Curiae* Wisconsin Employment Lawyers Association, a brief was filed by *Victor Forberger*, Madison.

For *Amicus Curiae* Wisconsin State AFL-CIO, a brief was filed by *Matthew R. Robbins*, *Sara J. Geenen* and *The Previant Law Firm*, Milwaukee.

2017 WI 46

No. 2015AP1055
(L.C. No. 2014CV3050)

STATE OF WISCONSIN : IN SUPREME COURT

Lela M. Operton,

Plaintiff-Appellant,

v.

Labor and Industry Review Commission,

Defendant-Respondent-Petitioner,

Walgreen Co. Illinois,

Defendant.

FILED

MAY 4, 2017

Diane M. Fremgen
Clerk of Supreme Court

REVIEW of a decision of the Court of Appeals. *Affirmed and cause remanded.*

¶1 PATIENCE DRAKE ROGGENSACK, C.J. This is a review of a published decision of the court of appeals[1] reversing a circuit court order that affirmed a determination by the Labor and Industry Review Commission (LIRC).[2] LIRC determined that Lela Operton (Operton) was ineligible for unemployment benefits because she was terminated for substantial fault.

[1] Operton v. LIRC, 2016 WI App 37, 369 Wis. 2d 166, 880 N.W.2d 169.

[2] The Honorable John C. Albert of Dane County presided.

¶2 We conclude that LIRC incorrectly denied Operton unemployment benefits. Operton was entitled to unemployment benefits because her actions do not fit within the definition of substantial fault as set forth in Wis. Stat. § 108.04(5g)(a)(2013-14)[3]. Stated more fully, Operton was terminated for committing "One or more inadvertent errors" during the course of her employment, and therefore pursuant to Wis. Stat. § 108.04(5g)(a)2., she was not terminated for substantial fault. We further conclude that, as a matter of law, Operton's eight accidental or careless cash-handling errors over the course of 80,000 cash-handling transactions were inadvertent.

¶3 Accordingly, we affirm the court of appeals and remand to LIRC to determine the amount of unemployment compensation Operton is owed.

I. BACKGROUND

¶4 The following undisputed facts, unless otherwise noted, are based on the findings of the Department of Workforce Development's (DWD) administrative law judge (ALJ) that LIRC adopted. From July 17, 2012 to March 24, 2014, Operton worked as a full-time service clerk for Walgreens. Operton's employment sometimes entailed more than one hundred cash-handling transactions in a day during the twenty months she was

[3] All subsequent references to the Wisconsin Statutes are to the 2013-14 version unless otherwise indicated.

employed full-time by Walgreens. She completed an estimated 80,000 cash-handling transactions[4] throughout her employment.

¶5 During her period of employment, Operton made various cash-handling errors. First, on October 19, 2012, Operton accepted a Women, Infants, and Children (WIC) check for $8.67 when the check should have been for $5.78. As a result, Walgreens lost $2.89 and gave Operton a verbal warning as punishment for her mistake.

¶6 Next, on February 12, 2013, Operton accepted a WIC check for $14.46, but did not get the customer's signature on the check. On March 6, 2013, she gave a $16.73 check back to a customer, and Walgreens suffered a $16.73 monetary loss as a result. Walgreens was unable to process these two checks and gave Operton a written warning for these two errors.

¶7 A few months later, Operton took a WIC check for $27.63 before the date on which it was valid. Walgreens was unable to process the check, and Operton received a final written warning.

¶8 On January 1, 2014, Operton returned a WIC check for $84.95 back to a customer that the customer had tried to use to purchase $84.95 worth of goods. Walgreens suffered a monetary loss of $84.95 because of this error and gave Operton an additional final written warning. And, on January 29, 2014, Operton received another final written warning as well as a two-

[4] Neither side disputes that this is roughly the number of cash-handling transactions that Operton completed.

day suspension after she accepted a check for $6.17 even though it was valid for $6.00, thereby causing Walgreens to lose seventeen cents. Soon after, a customer attempted to pay for $9.26 worth of items using a food share debit card, but the customer left the store without completing the transaction on the pin pad, which caused Walgreens to suffer a monetary loss of $9.26. Operton was issued another final written warning, which stated that any additional cash-handling errors would lead to her termination.

¶9 Furthermore, on March 22, 2014, Operton allowed a customer to use a credit card to purchase $399.27 worth of items, but did not check the customer's identification in violation of Walgreen's policy that employees must check a customer's identification on credit card purchases over $50. As a result, Walgreens suffered a monetary loss of $399.27. Walgreens later found out that the credit card was stolen when a manager was contacted by police.

¶10 As a result, on March 24, 2014, Walgreens terminated Operton's employment. Walgreens indicated that Operton was terminated due to multiple cash-handling errors as well as her inability to improve despite the accompanying warnings. Walgreens did not contend that any of Operton's errors were intentional or malicious.

¶11 After being terminated, Operton filed for unemployment benefits. Walgreens contested her request and contended that she was terminated due to an inability to perform her job. And,

initially, the DWD denied Operton unemployment benefits based on misconduct.

¶12 Operton appealed and an ALJ for the DWD held an evidentiary hearing. At the hearing, the ALJ concluded that Operton was ineligible for unemployment benefits. The ALJ found that there was "no evidence that the employee intentionally or willfully disregarded the employer's interests by continuing to make cash-handling errors. Additionally, her actions were not so careless or negligent so as to manifest culpability or wrongful intent."[5] Accordingly, the ALJ concluded that Operton had not committed "misconduct connected with her employment."[6]

¶13 However, the ALJ denied Operton unemployment benefits and concluded that Operton was terminated for substantial fault. The ALJ reasoned that Operton "did not dispute that the transactions for which she was given disciplinary action occurred, nor did she provide any testimony to establish that she did not have reasonable control over the actions that led to her discharge. She was aware of the employer's policies, including the cash-handling and WIC check procedures, but continued to make cash-handling errors resulting in actual financial loss to the employer, after receiving multiple warnings."[7]

[5] In the matter of Lela Operton, Hearing No. 14001606MD (June 4, 2014).

[6] Id.

[7] Id.

¶14 On September 19, 2014, LIRC adopted the findings and conclusions of the ALJ. Referring to the instance in which Operton failed to check an individual's identification when processing a credit card payment, LIRC stated: "This major infraction, taken together with the final warning regarding earlier cash transactions, persuades the commission that the employee's discharge was due to substantial fault."[8]

¶15 The circuit court affirmed LIRC's decision. In doing so, the circuit court deferred to LIRC in its entirety.

¶16 The court of appeals set aside LIRC's decision. The court concluded that LIRC "erred in its construction and application of 'substantial fault' to the facts presented."[9] The court of appeals reasoned that LIRC was owed no deference, and therefore de novo review was appropriate. Next, the court concluded, consistent with Wis. Stat. § 108.04(5g)(a), that an employee's multiple errors do not automatically transform the errors from inadvertent into intentional.[10]

¶17 This court granted LIRC's petition for review. We now affirm the court of appeals and remand to LIRC to determine the amount of unemployment compensation Operton is owed.

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[8] Lela Operton v. Walgreen Co., ERD No. 14001606MD (LIRC, September 19, 2014).

[9] Operton, 369 Wis. 2d 166, ¶1.

[10] Id., ¶32.

II. DISCUSSION

A. Standard of Review

¶18 "When there is an appeal from a LIRC determination, we review LIRC's decision rather than the decision of the circuit court." Masri v. LIRC, 2014 WI 81, ¶20, 356 Wis. 2d 405, 850 N.W.2d 298. "LIRC's findings of fact are upheld if they are supported by substantial and credible evidence." Brauneis v. LIRC, 2000 WI 69, ¶14, 236 Wis. 2d 27, 612 N.W.2d 635 (citing Hagen v. LIRC, 210 Wis. 2d 12, 23, 563 N.W.2d 454 (1997)).

¶19 In contrast, this court is "not bound by an agency's interpretation of a statute." Harnischfeger Corp. v. LIRC, 196 Wis. 2d 650, 659, 539 N.W.2d 98 (1995). However, "depending on the circumstances, an agency's interpretation of a statute is entitled to one of the following three levels of deference: great weight deference, due weight deference or no deference." Cty. of Dane v. LIRC, 2009 WI 9, ¶14, 315 Wis. 2d 293, 759 N.W.2d 571.

¶20 "Which level is appropriate 'depends on the comparative institutional capabilities and qualifications of the court and the administrative agency.'" UFE Inc. v. LIRC, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996) (quoting State ex rel. Parker v. Sullivan, 184 Wis. 2d 668, 699, 517 N.W.2d 449 (1994)). "Our basis for giving even due weight deference to an agency's statutory interpretation is bottomed on two required assumptions: the statute is one that the agency was charged with administering and the agency has at least some expertise in the interpretation of the statute in question." Racine Harley-

Davidson, Inc. v. Wis. Div. of Hearings & Appeals, 2006 WI 86, ¶107, 292 Wis. 2d 549, 717 N.W.2d 184 (Roggensack, J., concurring).

¶21 "In according due weight deference, we defer to an agency's statutory interpretation only when we conclude that another interpretation of the statute is not more reasonable than that chosen by the agency." Id., ¶105. As such, under due weight deference, the court is tasked with determining whether there is a more reasonable interpretation of the statute. "In order to decide that question, we make a comparison between the agency's interpretation and alternate interpretations. This comparison requires us to construe the statute ourselves." Id.

¶22 "We note here that there is little difference between due weight deference and no deference, since both situations require us to construe the statute ourselves. In so doing, we employ judicial expertise in statutory construction, and we embrace a major responsibility of the judicial branch of government, deciding what statutes mean." Cty. of Dane, 2009 WI 9, ¶19 (internal quotations omitted).

¶23 In the present case, the level of deference we afford LIRC is inconsequential as LIRC did not provide an articulated interpretation of Wis. Stat. § 108.04 in denying Operton unemployment benefits.[11] LIRC adopted the conclusions of the

[11] It is not entirely clear what role the substance of an agency's interpretation does or should play in determining the level of deference. Many of our cases discussing the levels of deference focus not on the presence or substance of an agency's interpretation; rather, they focus on the institutional (continued)

DWD's ALJ. But the ALJ did not describe its interpretation of the statute at issue, Wis. Stat. § 108.04(5g)(a).

¶24 Specifically, there are three types of actions exempted from the definition of substantial fault. However, the ALJ concluded that Operton's conduct did not fall within any of these categories without reasoning through each provision individually. Importantly, the ALJ never examined Operton's errors to determine if the errors were "inadvertent" under Wis. Stat. § 108.04(5g)(a)2.[12] The ALJ stated that "Operton was aware of the employer's policies, including the cash-handling and WIC check procedures, but continued to make cash-handling errors resulting in financial loss to the employer, after receiving

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capabilities of the agency as well as factors that pertain to the nature of the legal issue before the court. For this reason, perhaps our standard of review analysis in cases involving an agency's interpretation of a statute should include a threshold determination of whether the agency has articulated its interpretation of the statute. If the agency has not provided the court with an articulated interpretation of the statute, then the level of deference the agency is afforded is not at issue; we simply interpret and apply the statute. However, if the agency provided an articulated interpretation of the statute, we would proceed under our well-established framework to determine the level of deference to which the agency is entitled. Such a requirement seems intuitive. Nevertheless, we need not address this tension for purposes of the present case.

[12] As discussed more in depth below, Wis. Stat. § 108.04(5g)(a)2. exempts inadvertent errors by an employee from the type of conduct included in substantial fault.

multiple warnings."[13] It is unclear which prong of Wis. Stat. § 108.04(5g)(a) the ALJ was considering.

¶25 LIRC's decision adopting the findings and conclusions of the ALJ provided no clarification. Importantly, LIRC also did not discuss whether the errors that Operton committed were inadvertent and therefore a type of error exempted from the definition of substantial fault. LIRC merely stated:

> The employee did not offer any explanation for not checking the ID which would lead the commission to conclude that she lacked the ability to conform her conduct to the employer's reasonable requirement to check ID for large credit card transactions. This major infraction, taken together with the final warning regarding earlier cash transactions, persuades the commission that the employee's discharge was due to substantial fault.[14]

Absent from this reasoning is any discussion of "inadvertent errors" or the conduct the legislature explicitly exempted from the definition of substantial fault.

¶26 Accordingly, LIRC did not provide an articulated interpretation of the statute that it then applied. As such, whether we afford LIRC due weight deference or no deference is of no consequence. See deBoer Transp., Inc. v. Swenson, 2011 WI 64, ¶36, 335 Wis. 2d 599, 804 N.W.2d 658 ("However, we agree with the court of appeals that we need not decide the applicable

[13] In the matter of Lela Operton, Hearing No. 14001606MD (June 4, 2014).

[14] Lela Operton v. Walgreen Co., ERD No. 14001606MD (LIRC, September 19, 2014).

standard of review here because LIRC's statutory interpretation and application is unreasonable, and therefore, it will not withstand any level of deference." (citation omitted)). Therefore, we interpret Wis. Stat. § 108.04 under well-established principles of statutory interpretation to clearly explain the law.

B. Statutory Interpretation, General Principles

¶27 It is axiomatic that "the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." State ex rel. Kalal v. Circuit Court for Dane Cty., 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. "We assume that the legislature's intent is expressed in the statutory language." Id. For this reason, "statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" Id., ¶45 (quoting Seider v. O'Connell, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." Id., ¶45.

¶28 "Context is important to meaning." Id., ¶46. Accordingly, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." Id. (citations omitted).

¶29 Moreover, we need not consult extrinsic sources of interpretation if there is no ambiguity in the statute. Id. And, "a statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." Id., ¶47 (citing Bruno v. Milwaukee Cty., 2003 WI 28, ¶19, 260 Wis. 2d 633, 660 N.W.2d 656). After all, "the court is not at liberty to disregard the plain, clear words of the statute." Id. (quoting State v. Pratt, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967)).

¶30 These principles guide our interpretation and application of Wis. Stat. § 108.04 in the present case.

C. LIRC'S Interpretation of Wis. Stat. § 108.04(5g)

¶31 Wisconsin's unemployment compensation statutes embody a strong public policy in favor of compensating the unemployed. This policy is codified in Wis. Stat. § 108.01, which provides: "In good times and in bad times unemployment is a heavy social cost, directly affecting many thousands of wage earners. Each employing unit in Wisconsin should pay at least a part of this social cost, connected with its own irregular operations, by financing benefits for its own unemployed workers." Wis. Stat. § 108.01(1).

¶32 Consistent with this policy, Wis. Stat. ch. 108 is "liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status." Princess House, Inc. v. DILHR, 111 Wis. 2d 46, 62, 330 N.W.2d 169 (1983).

¶33 Nevertheless, not all employees are entitled to unemployment benefits. Under Wis. Stat. § 108.04, an individual may be disqualified from receiving unemployment benefits.

¶34 In 2013, the legislature changed the standard an employer must meet to disqualify an employee from receiving benefits. The legislative amendment created a two-tier system for determining when an employee is disqualified from receiving unemployment benefits. See Wis. Stat. § 108.04(5) & (5g). The first tier, disqualification for misconduct, existed prior to these amendments and is codified in § 108.04(5). This provision operates to prevent any employee discharged for misconduct from obtaining unemployment benefits. The legislature defined misconduct as:

> one or more actions or conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which an employer has a right to expect of his or her employees, or in carelessness or negligence of such degree or recurrence as to manifest culpability, wrongful intent, or evil design of equal severity to such disregard, or to show an intentional and substantial disregard of an employer's interests, or an employee's duties and obligations to his or her employer.

§ 108.04(5). The statute then provides examples of several actions that constitute misconduct. § 108.04(5)(a)-(g). If an employee is terminated as a result of any of the statutorily delineated actions or under the general definition of misconduct, then the employee's termination was for misconduct, and the employee is ineligible for unemployment benefits.

¶35 After the legislative amendments to the unemployment benefits statutes in 2013,[15] an employee who has not committed misconduct may nevertheless be ineligible for unemployment compensation. Stated otherwise, when an employee's conduct does not rise to the level of misconduct, the employee may be denied unemployment benefits if the employee was terminated for substantial fault. See Wis. Stat. § 108.04(5g). The statute provides:

> An employee whose work is terminated by an employing unit for substantial fault by the employee connected with the employee's work is ineligible to receive benefits until 7 weeks have elapsed since the end of the week in which the termination occurs and the employee earns wages after the week in which the termination occurs equal to at least 14 times the employee's weekly benefit rate under s. 108.05(1) in employment or other work covered by the unemployment insurance law of any state or the federal government. For purposes of requalification, the employee's benefit rate shall be the rate that would have been paid had the discharge not occurred.

§ 108.04(5g)(a).

¶36 Wisconsin Stat. § 108.04(5g) defines substantial fault broadly. It includes "acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer." Id. However, the legislature did not disqualify every employee who commits such errors from receiving unemployment benefits.

[15] Though enacted in 2013, these amendments became effective on January 5, 2014.

¶37 Instead, the legislature provided three types of conduct that are explicitly exempt from the definition of substantial fault. Under the statute, substantial fault does not include:

> 1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction.
>
> 2. One or more inadvertent errors made by the employee.
>
> 3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment.

Wis. Stat. § 108.04(5g)(a). Accordingly, if an employee is terminated for conduct that falls within any of the types of actions described by the legislature in para. (a), an employee's termination was not due to the "substantial fault" of the employee. § 108.04(5g)(a)1-3.

¶38 The burden is on the employer to show that the termination was due to the substantial fault of the employee. This is consistent with our past cases interpreting the unemployment benefits statutes in which we have held that "the party (the employer here) resisting payment of benefits has the burden of proving that the case comes within the disqualifying provision of the law. . . ." Brauneis, 236 Wis. 2d 27, ¶22; see also Consolidated Const. Co., Inc. v. Casey, 71 Wis. 2d 811, 820, 238 N.W.2d 758 (1976) (reasoning the burden is on the employer to show that "some disqualifying provision . . . should bar the employee's claim." (citing Kansas City Star Co. v. ILHR Dep't, 60 Wis. 2d 591, 602, 211 N.W.2d 488 (1973)).

¶39 Each of the provided-for exceptions are similar in nature insofar as they remove a type of conduct from what is considered substantial fault. Specifically, the statute exempts from the definition of substantial fault conduct that suggests the employee was prone to accidental errors or simply unable to adequately perform his or her job.

¶40 A review of the three types of actions the legislature exempted from substantial fault gives context to the definition of substantial fault. Wisconsin Stat. § 108.04(5g)(a)1. removes minor infractions from the type of conduct that is substantial fault, unless the employee had previously been warned about the infraction. An analysis of the proposed changes by the DWD states that this exception was intended to exempt "[m]inor violations of rules unless employee repeats the violation after receiving a warning." Department of Workforce Development, Analysis of Proposed UI Law Change, D12-01 (October 24, 2012). As such, employees who are terminated for a repetitive type of minor violation are not at substantial fault for their termination. If, however, the employee is warned about minor violations of an employer's rules and continues to commit the same violation, then the employee's termination may be due to the substantial fault of the employee.

¶41 Likewise, Wis. Stat. § 108.04(5g)(a)3. provides that an employee was not at substantial fault for his or her termination if the employee was incapable of performing the work the employment required. By its plain language, this provision

includes employees who are terminated for a lack of skill as well as employees who are not able to master job performance.

¶42 Operton does not contend that her conduct is exempt from substantial fault under either Wis. Stat. § 108.04(5g)(a)1. or § 108.04(5g)(a)3. Rather, Operton contends that her conduct does not fall within the definition of substantial fault because the errors for which she was discharged were "inadvertent" errors.

¶43 Accordingly, at issue in the present case is LIRC's interpretation of Wis. Stat. § 108.04(5g)(a)2., which exempts from substantial fault, "One or more inadvertent errors made by the employee." As discussed above, LIRC's decision contains no articulated interpretation of this subparagraph. Accordingly, we determine the proper meaning of the statutory provision in order to apply the law.

¶44 Under Wis. Stat. § 108.04(5g)(a)2., an employee's termination is not for substantial fault if the termination resulted from one or more inadvertent errors. Inadvertence is defined as "[a]n accidental oversight; the result of carelessness." Inadvertence, Black's Law Dictionary, 827 (9th ed. 2009); see also Queen Ins. Co. of America v. Kaiser, 27 Wis. 2d 571, 577, 135 N.W.2d 247 (1965) (concluding that "an inadvertent act of omission" was only "passive negligence" or "the failure to do something that should have been done"). The DWD's comment about these substantial fault provisions explained that this paragraph exempts "[u]nintentional mistakes made by the employee" from the definition of substantial fault.

Department of Workforce Development, Analysis of Proposed UI Law Change, D12-01 (October 24, 2012). Consequently, the words of the statute require courts to examine the circumstances surrounding an employee's error to determine if it was careless or unintentional.[16]

¶45 It is important to view Wis. Stat. § 108.04(5g)(a)2. in context to ascertain the types of conduct to which it applies. Notably, § 108.04(5g)(a)1. makes a distinction that § 108.04(5g)2. does not. Specifically, § 108.04(5g)(a)1. provides that one or more minor infractions does not constitute substantial fault unless an infraction is repeated and the employer has previously warned the employee about the infraction. In contrast, § 108.04(5g)(a)2. contains a different definition. There, an employer's warning is not dispositive of whether errors were inadvertent under § 108.04(5g)(a)2. That is not to say an employer's warning can never be relevant to whether an employee's error was inadvertent. However, an employee who is warned about an inadvertent error is not necessarily terminated for substantial fault even if the employee subsequently makes another error.

¶46 Finally, the statute does not state whether there is a limitation on the number of inadvertent errors an employee may commit before the employee's errors are no longer inadvertent.

[16] This definition of inadvertent is not inconsistent with the way in which the court of appeals defined inadvertent in Easterling v. LIRC, 2017 WI App 18, ___ Wis. 2d ___, ___ N.W.2d ___.

However, we need not determine if a numerical limit exists. Under the facts of this case, it suffices to interpret the statute to mean that multiple inadvertent errors, even if the employee has been warned about the errors, does not necessarily constitute substantial fault.

D. Application of Wis. Stat. § 108.04(5g)

¶47 In the present case, we must determine whether Operton's errors are exempted from the statutory definition of substantial fault. Specifically, we must determine whether Operton was terminated by Walgreens for "one or more inadvertent errors" during the course of her employment. We conclude that she was, and therefore her actions are exempted from the definition of substantial fault, and she is entitled to unemployment compensation.

¶48 At the outset, we note that LIRC's findings of fact within its misconduct analysis support our conclusion. LIRC found that none of Operton's errors was intentional or willful. Specifically, LIRC found that "there is no evidence that the employee intentionally or willfully disregarded the employer's interests by continuing to make cash handling errors."[17] Moreover, LIRC also found that Operton's "actions were not so careless or negligent so as to manifest culpability or wrongful intent."[18] As discussed below, there is nothing in the record

[17] Lela Operton v. Walgreen Co., ERD No. 14001606MD (LIRC, September 19, 2014) (adopting DWD administrative law judge's findings).

[18] Id.

that suggests these findings are erroneous. Accordingly, LIRC's factual findings support our conclusion that Operton's conduct falls within the "one or more inadvertent errors" provision, and therefore was the type of conduct the legislature exempted from the definition of substantial fault.

¶49 However, despite these findings, LIRC concluded that Operton was not entitled to unemployment compensation because she was terminated from Walgreens for substantial fault.[19] LIRC cited Operton's eight cash-handling errors and reasoned that she was aware of Walgreen's procedures but continued to make errors.

¶50 However, Operton's eight cash-handling errors were not so egregious as to warrant the conclusion that the errors were transformed from inadvertent to reckless or intentional under the facts of this case. Her errors occurred over a 21-month time period when Operton completed approximately 80,000 cash-handling transactions. Accordingly, we conclude that Operton's eight accidental or careless errors were, as a matter of law, "inadvertent errors" because Operton made these errors over the course of 80,000 cash-handling transactions during a 21-month period.

¶51 The length of time between Operton's errors supports this conclusion. Operton went months without making an error.

[19] We agree with LIRC that Operton's actions fall within the general definition of substantial fault before the exceptions are considered. Operton exercised reasonable control over the cash-handling transaction, and Walgreens' expectation that she handle such transactions properly was reasonable.

For example, after Operton's cash-handling error on October 19, 2012, she did not commit another error until February 12, 2013. Likewise, after her cash-handling error on July 26, 2013, she did not commit another error until January 1, 2014. Therefore, there were substantial periods of time in which Operton performed the duties of her job error-free.

¶52 Moreover, Operton was not repeatedly making the same error.[20] Yes, the errors were similar in nature; all of the errors were cash-handling mistakes. Yet, for the most part, Operton violated different rules or procedures each time. Operton's first error occurred when she accepted a WIC check for $8.67 worth of items even though the check was worth only $5.78. Operton committed a different type of error when she accidently gave a check back to a customer who had made a purchase for which the check was to serve as payment. This was the only time during her employment when she made this type of error. And, on a different occasion, a customer left without finishing the transaction on the pin pad. Again, this was not an error Operton made more than once. Finally, the error that she was ultimately terminated for——not checking identification of an individual using a credit card for a purchase over $50——was a different type of error than those she had previously made.

[20] It is worth noting that LIRC found that Operton was a conscientious employee, and her supervisor offered to serve as a reference for her following her termination from Walgreens.

¶53 Accordingly, the length of Operton's employment, the number of transactions Operton handled throughout her employment, and the variety of the errors she committed compels the conclusion that she was not terminated from Walgreens for substantial fault. While all of the errors fell within the same general cash-handling duties of her employment, the errors were, nevertheless, inadvertent.

¶54 Consequently, as a matter of law, Operton's errors are the type of conduct the legislature intended to exempt from substantial fault.[21] And, as a result, the LIRC improperly denied Operton unemployment benefits.

III. CONCLUSION

¶55 In light of the foregoing, we conclude that LIRC incorrectly denied Operton unemployment benefits. Operton was entitled to unemployment benefits because her actions did not fit within the definition of substantial fault as set forth in Wis. Stat. § 108.04(5g). Stated more fully, Operton was terminated for committing "One or more inadvertent errors" during the course of her employment, and therefore pursuant to Wis. Stat. § 108.04(5g)(a)2., she was not terminated for substantial fault. We further conclude that, as a matter of law, Operton's eight accidental or careless cash-handling errors

[21] We leave open whether there is a point at which the number of errors that seem inadvertent in isolation cease to be inadvertent when viewed in their totality. Because we conclude that, under the facts of this case, Operton's eight errors were inadvertent, we need not reach this issue.

over the course of 80,000 cash-handling transactions were inadvertent.

¶56 Accordingly, we affirm the court of appeals and remand to LIRC to determine the amount of unemployment compensation Operton is owed.

By the Court.—The court of appeals is affirmed, and the cause is remanded to the Labor and Industry Review Commission.

¶57 SHIRLEY S. ABRAHAMSON, J. *(concurring).* Wisconsin was the first state in the nation to have an unemployment compensation law.[1] We should get this decision right.

¶58 I agree with the court's mandate. The employer has the burden of proving that Lela Operton is not eligible for unemployment benefits. It has not met this burden. Lela Operton wins.

¶59 I do not join the majority opinion for two principal reasons: (1) This is a "no deference" case.[2] (2) The majority opinion injects extra-statutory considerations into its analysis of Wis. Stat. § 108.04(5g)(a)2.

(1)

¶60 This is a "no deference" case. The court of appeals got it right: De novo review is appropriate because LIRC "is applying a new statute to a new concept." Operton v. LIRC, 2016 WI App 37, ¶20, 369 Wis. 2d 166, 880 N.W.2d 169.[3] This court

[1] See Brief of Amicus Curiae Wisconsin State AFL-CIO; Brief of Amicus Curiae Wisconsin Employment Lawyers Association.

[2] I have difficulty with footnote 12 of the majority opinion. I do not understand the nature and scope of the majority opinion's reference to the "facts that pertain to the nature of the legal issue" or to the "substance of an agency's interpretation," which it refers to as a "threshold question." Nothing suggestive of this remark has been raised or briefed in the instant case.

[3] See also Racine Harley-Davidson, Inc. v. State, Div. of Hearings & Appeals, 2006 WI 86, ¶20, 292 Wis. 2d 549, 565-66, 717 N.W.2d 184 (footnotes omitted):

> Thus, due weight deference and no deference to an agency's interpretation of a statute are similar.

(continued)

independently decides how to interpret Wis. Stat. § 108.04(5g)(a)2. Regardless of the deference issue, LIRC erred.

(2)

¶61 The majority opinion's analysis of Wis. Stat. § 108.04(5g)(a)2. significantly strays from the statutory text. It injects two extra-statutory considerations into its analysis of § 108.04(5g)(a)2.

¶62 The first statutory misstep is that the majority opinion adds the idea of a "warning" to Wis. Stat. § 108.04(5g)(a)2. The court of appeals got it right, concluding that "[t]he ALJ and LIRC erred in merging the 'warning' component set forth in the 'infraction' exception in § 108.04(5g)(a)1. with the 'inadvertent error' exception in § 108.04(5g)(a)2. . . . Inadvertent errors, warnings or no warnings, never meet the statutory definition of substantial fault." Operton, 369 Wis. 2d 166, ¶¶24, 28.

Under both due weight deference and no deference, the reviewing court may adopt, without regard for the agency's interpretation, what it views as the most reasonable interpretation of the statute. When due weight deference is accorded an agency, however, a reviewing court will not reverse the agency's statutory interpretation when an alternative interpretation is equally reasonable. In contrast, in a no deference review of an agency's statutory interpretation, the reviewing court merely benefits from the agency's determination and may reverse the agency's interpretation even when an alternative statutory interpretation is equally reasonable to the interpretation of the agency.

¶63 Although the majority opinion concedes that the "inadvertent errors" language in § 108.04(5g)(a)2. (in contrast with the language in § 108.04(5g)(a)1.)[4] contains no language regarding warnings to employees, the majority opinion tells readers, with a straight face, that "an employer's warnings" are "relevant" in § 108.04(5g)(a)2. Majority op., ¶45.

¶64 I agree with Judge Lundsten's concurrence in the court of appeals: "Warnings are not relevant under the 'inadvertent errors' alternative." Operton, 369 Wis. 2d 166, ¶45 (Lundsten, J., concurring).

¶65 The second statutory misstep occurs when the majority opinion "leave[s] open whether there is a point at which the number of errors that seem inadvertent in isolation cease to be inadvertent when viewed in their totality. . . . " Majority op., ¶54 n.21. By reserving this question, and thus including this extra-statutory consideration in its analysis, see majority op., ¶¶51-53, the majority opinion once again performs a statutory analysis that is not tethered to the statutory language.

[4] Compare Wis. Stat. § 108.04(5g)(a)1. (Substantial fault does not include "[o]ne or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction.") (emphasis added) with § 108.04(5g)(a)2. (Substantial fault does not include "[o]ne or more inadvertent errors made by the employee."). See also Operton, 369 Wis. 2d 166, ¶45 (Lundsten, J., concurring) ("This omission [of warnings], on the heels of express warning language in the rules infractions alternative, supports the conclusion that warnings are not relevant under the 'inadvertent errors' "alternative.").

¶66 The statutory language provides that substantial fault does not include "one or more inadvertent errors . . . ." Wis. Stat. § 108.04(5g)(a)2. According to this text, the "inadvertent errors" analysis contains no numerical limits.

¶67 I agree with Judge Lundsten's concurrence in the court of appeals: "[T]he statute tells us that, if all we have is repeated . . . 'inadvertent errors,' we do not have 'substantial fault.'"[5]

¶68 These missteps demonstrate that the majority opinion does not apply the rule that the unemployment compensation law is to be "liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status." Princess House, Inc. v. DILHR, 111 Wis. 2d 46, 62, 330 N.W.2d 169 (1983).

¶69 For the reasons set forth, I conclude that Lela Operton prevails, but I do not join the majority opinion.

¶70 I am authorized to state that Justice ANN WALSH BRADLEY joins this opinion.

[5] Operton, 369 Wis. 2d 166, ¶43 (Lundsten, J., concurring).

¶71 ANNETTE KINGSLAND ZIEGLER, J. *(concurring)*. I join the court's opinion. I write separately to make a brief observation about agency deference. While the subject of agency deference may currently be a "hot button" issue, the law in Wisconsin on the subject is well-established: under proper circumstances this court will defer, to varying degrees, to an agency's interpretation of a statute. See, e.g., Wisconsin Dep't of Revenue v. Menasha Corp., 2008 WI 88, ¶¶47-50, 311 Wis. 2d 579, 754 N.W.2d 95. The parties in this case did not ask the court to address whether changes to that approach are warranted. There is little doubt that ending the court's practice of according deference to agency interpretations of statutes would constitute a sea change in Wisconsin law, and many interested parties would likely wish to weigh in. Consequently, I would want to see the issue set forth, briefed, and argued before expressing an opinion on the merits of such a change.

¶72 For the foregoing reasons, I respectfully concur.

¶73 REBECCA GRASSL BRADLEY, J. *(concurring)*. Although I join the majority opinion, I write separately to question whether this court's practice of deferring to agency interpretations of statutes comports with the Wisconsin Constitution, which vests judicial power in this court——not administrative agencies. The Labor and Industry Review Commission (LIRC) asks this court to give "great weight" deference to its interpretation of the term "substantial fault" in Wis. Stat. § 108.04(5g)(a) (2013-14). Because "LIRC did not provide an articulated interpretation of § 108.04 in denying Operton unemployment benefits," the majority properly conducts an independent interpretation of § 108.04 without giving deference to LIRC. Majority op., ¶¶23-26. The doctrine of deference to agencies' statutory interpretation is a judicial creation that circumvents the court's duty to say what the law is and risks perpetuating erroneous declarations of the law. Because the court in this case fulfills its interpretive duty, I join the majority opinion but urge the court to reconsider its decades-long abdication of this core judicial function.

¶74 This court's current deference framework arises out of two cases from the mid-1990s. In Harnischfeger Corp. v. LIRC, 196 Wis. 2d 650, 539 N.W.2d 98 (1995), the court identified "three distinct levels of deference to agency interpretations: great weight, due weight and de novo review." Id. at 659-60 (citing Jicha v. DILHR, 169 Wis. 2d 284, 290, 485 N.W.2d 256 (1992)). "Great weight" deference applies when four conditions are met:

> (1) the agency was charged by the legislature with the duty of administering the statute; (2) [] the interpretation of the agency is one of long-standing; (3) [] the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) [] the agency's interpretation will provide uniformity and consistency in the application of the statute.

Id. at 660 (citing Lisney v. LIRC, 171 Wis. 2d 499, 505, 493 N.W.2d 14 (1992)). If an agency's interpretation of a statute qualifies for great weight deference, then the "interpretation must [] merely be reasonable for it to be sustained," and an interpretation is unreasonable only "if it directly contravenes the words of the statute, [] is clearly contrary to legislative intent or [] is without rational basis." Id. at 661-62.

¶75 In UFE Inc. v. LIRC, 201 Wis. 2d 274, 548 N.W.2d 57 (1996), this court elaborated on the "due weight" deference standard. "Under the due weight standard, 'a court need not defer to an agency's interpretation which, while reasonable, is not the interpretation which the court considers best and most reasonable.'" Id. at 286 (quoting Harnischfeger, 196 Wis. 2d at 660 n.4). Courts give due weight deference when an agency has "some experience" interpreting a statute but not so much as to "develop[] the expertise which necessarily places it in a better position" than a court "to make judgments regarding the interpretation." Id. An agency lacking special knowledge or expertise nevertheless might receive some deference if "the legislature has charged the agency with the enforcement of the statute in question." Id. A court giving due weight deference to an agency interpretation "will not overturn a reasonable agency decision that comports with the purpose of the statute

unless the court determines that there is a more reasonable interpretation available." Id. at 286-87.

¶76 Examination of the pre-Harnischfeger standard for reviewing agency interpretations of statutes suggests that the Harnischfeger court did not simply apply existing law——it recast it.[1] Before Harnischfeger, this court often articulated a slightly different standard of review: "[I]t is a well-established principle of statutory construction that the construction and interpretation of a statute adopted by an administrative agency charged with the duty of applying the law is entitled to great weight." Schwartz v. DILHR, 72 Wis. 2d 217, 221, 240 N.W.2d 173 (1976). Tracing that principle's development in Wisconsin law backwards from Harnischfeger leads to its source: Harrington v. Smith, 28 Wis. 43 (1871).[2]

¶77 Harrington presented this court with a dispute over the interpretation of a statute. Observing that "[t]he statute

[1] For a more complete evaluation of the court's characterization of existing law in Harnischfeger Corp. v. LIRC, 196 Wis. 2d 650, 539 N.W.2d 98 (1995), see Patience Drake Roggensack, Elected to Decide: Is the Decision-Avoidance Doctrine of Great Weight Deference Appropriate in This Court of Last Resort?, 89 Marq. L. Rev. 541, 548-61 (2006).

[2] See, e.g., Lisney v. LIRC, 171 Wis. 2d 499, 505-06, 493 N.W.2d 14 (1992); West Bend Educ. Ass'n v. WERC, 121 Wis. 2d 1, 12, 357 N.W.2d 534 (1984); Pigeon v. DILHR, 109 Wis. 2d 519, 524-25, 326 N.W.2d 752 (1982); Schwartz v. DILHR, 72 Wis. 2d 217, 221, 240 N.W.2d 173 (1976); City of Milwaukee v. WERC, 43 Wis. 2d 596, 599-601, 168 N.W.2d 809 (1969); Mednis v. Indus. Comm'n, 27 Wis. 2d 439, 444, 134 N.W.2d 416 (1965); Trczyniewski v. City of Milwaukee, 15 Wis. 2d 236, 240, 112 N.W.2d 725 (1961).

in question was enacted and has been continuously interpreted, understood and acted upon by the executive department of the government, the officers appointed by law to carry its provisions into effect, . . . for a period of over twenty-one years, and during twelve successive administrations of the state," the court concluded that "[g]reat weight is undoubtedly to be attached to a construction which has thus been given." Id. at 68-69. Accordingly, the Harrington court explained: "Long and uninterrupted practice under a statute, especially by the officers whose duty it was to execute it, is good evidence of its construction, and such practical construction will be adhered to, even though, were it res integra,[3] it might be difficult to maintain it." Harrington, 28 Wis. at 68. In support of that proposition, this court cited, among other authorities, Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206 (1827), which stated that, "[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." Id. at 210.[4]

[3] Latin for "an entire thing," as a legal term res integra refers to an "undecided question of law" or a "case of first impression." Res Integra, Black's Law Dictionary 1503 (10th ed. 2014) (citing Res Nova, id. at 1504).

[4] In Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984), the Supreme Court also cited Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206 (1827), among many other cases, when constructing the two-step framework that has become the cornerstone of judicial review of agency determinations at the federal level. Chevron, 467 U.S. at 844 (continued)

¶78 By recognizing the value of executive interpretations without entirely ceding interpretive authority to the executive, these older cases reflect a more nuanced appreciation for judicial interaction with agency interpretation than this court's post-Harnischfeger deference standards permit. The prevailing scheme of deference hamstrings a court of last resort——with self-imposed shackles——from independently interpreting the law, thereby thwarting the constitutional structure of dispersing power among the three branches of government. Because this structure has long been recognized as the essential safeguard of individual rights and liberty,[5] this

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n.14. Although I will not, in this writing, endeavor to conduct a comprehensive review comparing federal agency deference to Wisconsin law, it suffices for now to note that federal administrative deference under Chevron seems to raise separation of powers concerns under the United States Constitution similar to those I identify in Wisconsin. See, e.g., Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (arguing that transferring "ultimate interpretive authority" to the Executive "is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies"); City of Arlington v. FCC, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) ("It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed."); see also Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) ("Transferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions.").

[5] "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double (continued)

court should reinforce that structure as a check against the concentration of power in the executive branch. "The doctrine of separation of powers, a fundamental principle of American constitutional government, is embodied in the clauses of the Wisconsin Constitution providing that the legislative power shall be vested in a senate and assembly, the executive power in a governor . . . , and the judicial power in the courts." State v. Washington, 83 Wis. 2d 808, 816, 266 N.W.2d 597 (1978) (citations omitted). No less than in the federal system, in Wisconsin "[i]t is emphatically the province and duty of the judicial department to say what the law is." State v. Williams, 2012 WI 59, ¶36 n.13, 341 Wis. 2d 191, 814 N.W.2d 460 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); see also State ex rel. Wis. Senate v. Thompson, 144 Wis. 2d 429, 436-37, 424 N.W.2d 385 (1988).

¶79 Acknowledging respect for a longstanding interpretation of a statute is a far cry from a judicial doctrine of "great weight" deference that relinquishes the court's responsibility to independently interpret statutes. Equally troubling is the possibility that seven elected justices——or, indeed, any elected judge accountable to the people of Wisconsin——might give "great weight" deference to an agency decision by a single, unelected administrative law judge or hearing examiner against whom the people have no recourse. Administrative rulemaking already shifts some lawmaking power to

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security arises to the rights of the people." The Federalist No. 51 (James Madison) (Clinton Rossiter ed., 1961).

unelected officials and away from the processes of passage and presentment contemplated by our constitution. Judicial deference to executive interpretations further widens the gap between the people and the laws that govern them.

¶80 The framers of our constitutions chose to disperse authority within the federal Republic and our state because they recognized that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47 (James Madison) (Clinton Rossiter ed., 1961). As this court has recognized since Harrington, no harm comes to that separation when the judicial branch treats a well-developed executive interpretation of a statute as "some evidence of what the law is." Harrington, 28 Wis. at 69. But when the legislature delegates broad authority to an executive agency, which in turn interprets and enforces that delegated authority, the judiciary risks the liberty of all citizens if it abdicates its constitutional responsibility to check executive interpretations of the law. Because no such abdication occurs here, I join the majority opinion and respectfully concur.

¶81 I am authorized to state that Justices MICHAEL J. GABLEMAN and DANIEL KELLY join this concurrence.

UIAC Proposal Tracking - 2017

No.	Department Proposal Title/Description	Presented to UIAC	Action
D17-01	Assessment for Employers that Fail to Comply with Adjudication Request	1-19-17 2-16-17 Revised	
D17-02	Fiscal Agent Joint and Several Liability	1-19-17	Approved 4-20-17
D17-03	Assessment for Failure to Produce Records	1-19-17	
D17-04	Ineligibility for Concealment of Holiday, Vacation, Termination, or Sick Pay	1-19-17	Approved 4-20-17
D17-05	Ineligibility for Failure to Provide Information	1-19-17	Approved 4-20-17
D17-06	Standard of Proof in Unemployment Insurance Law Cases	1-19-17 2-16-17 Fiscal	
D17-07	Revision of Collections Statutes	1-19-17	
D17-08	Various Minor and Technical Changes	1-19-17 2-16-17 Fiscal 3-16-17 Revised	
D17-09	Various Administrative Rule Changes	1-19-17	Approved 3-16-17
D17-10	Amendments to Drug Testing Statutes	3-16-17 4-20-17 Revised	Approved 4-20-17

No.	Management Proposal Title/Description	Presented to UIAC	Action
M17-01			
M17-02			
M17-03			
M17-04			
M17-05			
M17-06			
M17-07			
M17-08			
M17-09			
M17-10			

No.	Labor Proposal Title/Description	Presented to UIAC	Action
L17-01			
L17-02			
L17-03			
L17-04			
L17-05			
L17-06			
L17-07			
L17-08			
L17-09			
L17-10			

Unemployment Insurance Advisory Council
Tentative Schedule
2017

May 11, 2017	Re-Scheduled Meeting of the Advisory Council Discussion of Labor & Management Law Change Proposals. Discussion of Agreed Upon Bill
May 23, 2017	Additional Meeting of the Advisory Council Discussion of Labor & Management Law Change Proposals. Discussion of Agreed Upon Bill
June 15, 2017	Scheduled Meeting of the Advisory Council Final Draft Review Agreed Upon Bill
July 18, 2017	TBD
August 17, 2017	TBD
September 15, 2017	TBD
October 19, 2017	TBD
November 16, 2017	TBD
December 21, 2017	TBD

2017-2018 Legislative Session Schedule

January 3, 2017	2017 Inauguration
January 10, 2017	Floorperiod
January 17 to 19, 2017	Floorperiod
February 7 and 9, 2017	Floorperiod
March 7 to 9, 2017	Floorperiod
March 28 to April 6, 2017	Floorperiod
April 20, 2017	Bills sent to Governor
May 2 to 11, 2017	Floorperiod
June 6 to 30, 2017, **OR** budget passage	Floorperiod
August 3, 2017	Nonbudget Bills sent to Governor
August 3, 2017 (or later)	Budget Bill sent to Governor
September 12 to 21, 2017	Floorperiod
October 10 to October 12, 2017	Floorperiod
October 31 to November 9, 2017	Floorperiod
December 7, 2017	Bills sent to Governor
January 16 to 25, 2018	Floorperiod
February 13 to 22, 2018	Floorperiod
March 13 to 22, 2018	Last general-business Floorperiod
April 12, 2018	Bills sent to Governor
April 17 to 19, 2018	Limited-business Floorperiod
April 26, 2018	Bills sent to Governor
May 8 and 9, 2018	Veto Review Floorperiod
March 23, 2018 to January 7, 2019	Interim, committee work
May 23, 2018	Bills sent to Governor
January 7, 2019	2019 Inauguration